3360

NO. 20242

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PERMANENTE STEAMSHIP CORPORATION, a corporation,

Appellant,

v.

JUAN A. G. MARTINEZ,

Appellee.

# BRIEF FOR APPELLANT PERMANENTE STEAMSHIP CORPORATION

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# SUBJECT INDEX

# TABLE OF AUTHORITIES CITED

Texts

Page

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PERMANENTE STEAMSHIP CORPORATION, )
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Appellant, ) APPEAL FROM THE UNITED
v. ) STATES DISTRICT COURT
) FOR THE DISTRICT OF
JUAN A. G. MARTINEZ, ) HAWAII
Appellee. )
)

# BRIEF FOR APPELLANT
# PERMANENTE STEAMSHIP CORPORATION

## JURISDICTION

The jurisdiction of the United States District Court for the District of Hawaii was based upon Section 33 of the Jones Act, 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958), and 28 U.S.C. § 1333 (1958). The jurisdiction of this Court rests on 28 U.S.C. § 1291 (1958). The supplemental judgment herein appealed from was entered on April 12, 1965 (R.224), and the notice of appeal therefrom was filed on May 10, 1965 (R.227).

## STATEMENT OF THE CASE

### I. Proceedings Below.

This is an action against defendant-appellant Permanente Steamship Corporation (hereinafter referred to as "Permanente") for damages for injuries allegedly sustained by plaintiff-appellee Martinez while a seaman aboard Permanente's vessel the SS Permanente Silverbow (hereinafter referred to as the "Silverbow") (R.142). The "Action Under Special Rule for Seamen . . .", which was filed on August 5, 1959 (R.2) alleged that Plaintiff had been injured on or about July 24, 1957 (R.5). It set forth two counts, one under the Jones Act, 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958), and the other to recover maintenance and cure in the sum of $10,000 (R.4-7). Judgment below was for Permanente on the Jones Act count, based upon a jury verdict that neither Permanente's negligence nor the Silverbow's unseaworthiness was the cause of the Plaintiff's accident (R.166). The Trial Court, however, awarded Plaintiff maintenance and cure in the amount of $8,534.00 in the supplementary judgment below from which this appeal is taken (R.224).

At the end of the pre-trial conference on December 18, 1963, the day before the trial started,

Permanente moved for summary judgment on the issue of maintenance and cure (Tr.E-26). At the commencement of the trial, the Court denied Permanente's motion (Tr.2a). At the close of Plaintiff's case and again at the conclusion of the evidence, Permanente moved for a directed verdict on the issue of maintenance and cure, but each time the Court denied the motion (Tr.524, 525, 748, 750).

Prior to settling instructions at a conference in chambers on December 27, 1963, the parties stipulated that the issue of maintenance and cure be withdrawn from the jury and be submitted to the Court on both the law and the facts for his determination (Tr.754). The stipulation was preserved in the Court's final judgment in favor of Permanente on the Jones Act count which was entered on January 3, 1964, reserving the issue of maintenance and cure (R.169).

Thereafter the parties submitted memoranda and argued the issue of maintenance and cure on May 26, 1964 (Tr.G-12). The Plaintiff's theory with regard to maintenance and cure had been finally established in the pre-trial order as follows:

> "2) Maintenance and Cure--Due and payable from January 1961 to the date of trial at $56.00 per week, less in-patient time in the hospital, plus hospital and

> medical expenses, plus maintenance and cure for a reasonable time in the future . . . ." (R.142-143)

Permanente resisted Plaintiff's count for maintenance and cure on the following grounds: (1) Plaintiff's subsequent employment on the same and many other ships (R.177, Tr.G-32); (2) Plaintiff's certification as fit for duty by the United States Public Health Service Clinic in Honolulu on July 24, 1957 (R.184); (3) Plaintiff's failure to seek and obtain available medical relief at United States Public Health Service Clinics ( R.186, Tr.G-40); and (4) Lack of competent proof that Plaintiff's disability commencing in 1961 (long after departing the Silverbow) was proximately caused by the fall suffered aboard the Silverbow (R.191, Tr.G-43).

After the Court decided the maintenance and cure issue in Plaintiff's favor, Plaintiff's attorney served proposed findings of fact and conclusions of law. Permanente filed objections to and motion to amend the proposed findings of fact (R.213-217), but at the hearing thereon the Court refused to re-examine its decision (Tr.H-16). Thereafter, findings of fact and conclusions of law were entered and filed on March 31, 1965. They held that Plaintiff was entitled to maintenance from

January 1, 1961 through December 10, 1962, February 20, 1963 through March 2, 1963, and March 13, 1963 to December 15, 1963 in the amount of $7,984.00 and to cure in the amount of $550.00, for a total sum of $8,534.00. The supplemental judgment herein appealed from was entered, and Permanente filed its notice of appeal as stated above.

## II. Facts of the Case

### A. Plaintiff's Background.

Plaintiff, a Puerto Rican, had started sailing in 1945 at the age of seventeen (Tr.178). After his discharge from Korean War duty in the Army in 1953 (Tr.177-178), Plaintiff apparently resumed his work as a seaman, and his life went on uneventfully except for a couple of arrests for drunkenness in 1954 and 1955 (Tr.725). Plaintiff testifed that prior to the accident his health had been good and that he had had no sickness or injuries other than colds and measles as a child, venereal disease and a stab wound in 1950 (Tr.292, 320-321, 324-329, 725-727, Ex. P-5 & P-6).

In March, 1957, Plaintiff signed on the Silverbow as an officer's bedroom steward (Tr.181, 329). Plaintiff's living quarters were in the Messmen's Room, No. 34 where he was assigned to the upper bunk of a double decker (Tr. 182-183, 195, 671).

Another seaman living in the same room was named Awakuni. He had sailed aboard the Silverbow from February, 1957 to February, 1958, as a utility man (Tr.196, 665-666). Awakuni was the union delegate for the Steward's Department (Tr.667-668).

### B. The Accident.

There is agreement that on the night of July 23 and the early morning of July 24, 1957, the Silverbow was at Pier 30 in Honolulu (Tr.195, 335, 674, Ex.P-13) and that Plaintiff was still employed by Permanente as a seaman on the ship (R.144). Beyond that there is conflicting testimony concerning how and when the accident occurred. On various occasions Plaintiff, himself, told several different stories as to how the accident occurred.

Awakuni, the union delegate, testified that when he returned to the Silverbow between 12:00 midnight and 12:30 a.m., July 24, 1957 (Tr.674-675, 684) Plaintiff was not in his bunk (Tr.704); there was no one in the room (Tr.675-676). Awakuni went to bed and to sleep (Tr.676). He was awakened by a noise (Tr.674, 692) and put his light on. He saw Plaintiff walking around the room (Tr.674 but see Tr.692 and 710-711). Plaintiff told Awakuni that he fell from his bunk (Tr.676-677). Awakuni then got up and helped Plaintiff get into his bunk, pushing him up by the

buttocks (Tr.678, 679, 705-706). Awakuni then put his light out and went back to sleep (Tr.678-679).

Awakuni testified that the next morning when he talked to Plaintiff, he saw a small cut and some crusted blood righton top of Plaintiff's head and told him to get a Master's certificate, a document authorizing Plaintiff to go to a U.S. Public Health Service clinic, and have the cut checked (Tr.679-681). Also that morning, Awakuni saw a small spot of blood on the floor of the Messmen's Room (Tr.695-696). Plaintiff never did tell Awakuni how he injured his head (Tr.684-685, 696). Awakuni did not see Plaintiff fall (Tr.690, 707, 708, Ex.P-15).

Captain O'Brien, the Master of the Silverbow, testifed that on the morning of July 24, 1957, Plaintiff came into his office from the direction of the purser's office. Captain O'Brien described his conversation with the Plaintiff in his letter dated July 29, 1957 as follows:

> "I asked him how it happened and he just shrugged, smiled and said 'Fell out of the bunk, the upper bunk, just rolled over and wham, fell out.'" (Ex.P-13 and see Tr.444, 455-456, 517)

Plaintiff told the purser, however, that he fell off a chair trying to crawl into an upper bunk (Tr.517, Ex.D-1). Plaintiff's signed statement in his own words in Permanente's report of injury is:

> "There is no ladder by which I can climb into my upper bunk, and I fell off the chair trying to crawl up into it, and hit the edge of the bunk below with the top of my head as I fell. Dave Awakuni, messman, helped me up. Signed: Juan G. Martinez" ( Ex.D-1, Tr.356)

Captain O'Brien, in his letter dated July 29, 1957 which transmitted the report of injury to Permanente noted the difference between what Plaintiff told him and Plaintiff's signed statement in the report of injury (Tr.444-445, 446).

When Plaintiff was deposed on behalf of Permanente on July 20, 1960, he introduced a third version of how the accident occurred. He testified at this time that on the night of the accident, he was trying to get up and go to the bathroom and he bumped his head on a small shelf which was attached to the bulhead over his bunk. Immediately thereafter, he bumped his head again--this time on the ceiling (Tr.343-344, 347, Ex.D-7). He then fell from his bunk and hit his head a a third time on the deck, knocking himself out (Tr.345-346, 347, Ex.D-7). At this time he said that the lack of a ladder had nothing to do with the accident at all (Tr.358-359, Ex.D-7)

At the trial, Plaintiff presented a fourth version of how the accident happened. Plaintiff testified that on July 23, 1957, after finishing work about 5:00 p.m., cleaned up and about 6:30 p.m. went to his bunk and started reading. He testified as follows: He fell asleep about 8:00 p.m. and that a 11:30 p.m. he woke up because he wanted to go to the toilet. H

was lying on his back. He raised his head and hit the crown of his head on the corner of the shelf that was projected from the bulkhead above his bunk and was knocked unconscious (Tr.196, 202, 336-341, 347). He did not hit his head on anything else (Tr.341-342). The next thing he remembers is waking up on the deck and Awakuni picking him up (Tr.196-197, 202-203, 344-345, 347). Plaintiff was groggy at the time and his head and back hurt (Tr.196-197, 202-203, 347, 349). He asked Awakuni, "Who hit me?" Awakuni replied, "Nobody hit you; you fell out of the bunk; you hit the deck." (Tr.196-197, 241, 350). Awakuni wiped the blood from his face and head and put him in a lower bunk while he went to get the purser (Tr.196-197, 347-348, 350, 351). After Awakuni put him in the bottom bunk, Plaintiff lay down and either went to sleep or passed out (Tr.204-205, 348). He did not go to the bathroom (Tr.351). He testified that he didn't remember anything else until the next morning (Tr.349). He also testified, however, that when Awakuni returned to the room he did not bring the purser with him (Tr.199).

At trial Plaintiff denied that he had gone up to a bar in Honolulu and come back to the room around 1:00 in the morning (Tr.385).

Plaintiff testified that the next morning he first saw Awakuni in the passageway outside the Messmen's Room. Awakuni told him to go see the Captain (Tr.360-361). He went to see the Captain and told him about the accident (Tr.205, 264). He told the Captain that he bumped his head on the shelf, got knocked out and fell out of the bunk (Tr.264, 355, 363). Plaintiff also testified that he told Awakuni that he hit his head on the shelf (Tr. 363-364) and that he had never given a different explanation of the fall than that (Tr.354). He claimed that the statement in the report of injury merely embodied the purser's idea of how the accident happened (Tr.355-357, 359-360, 364, 382). Plaintiff also testified that the text of the report of injury indicating that the accident happened on 24 July, 1957 at 1:00 a.m. was a mistake (Tr.382-383) and that the text that he first reported the fall to the purser at 8:00 a.m. the next morning was "a lie" (Tr.381).

Permanente's expert testified that there was adequate lateral clearance in the bunk for Plaintiff to sit up without touching the shelf (Tr.630-634, 637-638, 648-649). Plaintiff's expert admitted that

Plaintiff would not hit the center of his head on the shelf if he sat straight up, unless he had been lying on the bunk at an angle (Tr.738-739).

With regard to the time that the accident occurred, Awakuni's testimony indicated that it happened some time after he came back to the ship and went to bed between 12:00 and 12:30 on the morning of July 24, 1957 (Tr.674). Permanente's report of injury indicated that it occurred at 1:00 a.m. (Ex.D-1). Plaintiff testified repeatedly that the accident "must have happened" at 11:30 p.m. on July 23, 1957 (Tr.196, 338, 351, 352, 382-383, 385). Plaintiff also testified, however, that he never looked at the clock in the Messmen's Room (Tr.351-352, 386).

### C. Events During the Day on July 24, 1957.

Plaintiff testified that the morning after the accident he had a pain in his back and head (Tr.205). He testified that he went to see the Captain and showed

him his head injury (Tr.205, 264) and told him that his back and neck hurt (Tr.264, 355). The Captain, however, testified to the contrary (Tr.441-442, 447-448). The Captain told him that he needed medical attention and that he should go to the Public Health Service (Tr.206-207, 264).

Plaintiff testified that at the Public Health Service he was placed on a gurney (Tr.264), where he passed out for a few minutes (Tr.207, 264). A nurse shaved his head, and the doctor said that stitches could not be used to close the cut because it was already old; so some kind of clip or tape was used instead (Tr.207, 264, 361-362). Plaintiff testified that the doctor told him to go back to the ship (Tr.208-209) and told him to rest awhile (Tr.264). He returned to the ship (Tr.362).

The abstract from the clinical record of the U.S. Public Health Service Clinic in Honolulu concerning Plaintiff's visit states:

> "2. [EXAMINATION] Laceration vertex--superficial. Vision normal. Extra-ocular movements and neurological examination normal."
> (Ex.D-4a)

The U.S. Public Health Service found that Plaintiff's

condition on discharge was "fit for duty" (Ex.D-4a).

### D. Remainder of 1957.

Plaintiff testified that after the ship sailed from Honolulu he got sick for three days with fever (Tr. 209). He had pain in his back and his head (Tr.265-266). He did not see the purser, however, until four or five days after the accident when the purser brought the report of injury down for him to sign. He testified that he complained to the purser about his neck hurting, his back and headaches and that the purser gave him pills (Tr.265). He testified that about twelve to fifteen days after the accident he had an attack of dizziness, blurring of vision, pain in his head or neck and numbness in his arms and legs, so that he had to go back to his room and lie down for 30 to 45 minutes (Tr.209-210, 211, 265-266), and that this was when he started having headaches and dizzy spells (Tr.365). He also testified, however, that the numbness in his arms and legs started one or two months after the accident (Tr.365-366). He testified that he continued to go to the purser for pills (Tr.213-214, 265-266) and that when the vessel was in port he would get pills from druggists for his symptoms (Tr.214-215).

Captain O'Brien testified that Plaintiff did not make any complaints to him concerning his physical condition during the remainder of his stay aboard the Silverbow. He also testified that to his knowledge Plaintiff made no complaints concerning his physical condition to the purser or any other officer (Tr.461).

Plaintiff continued to work aboard the Silverbow for over four months after the accident until December 12, 1957 (Tr.212, 266-267, 362-363, 517 Ex.P-11). He left the ship of his own accord. He was not given a medical discharge from the ship and he did not ask for a Master's certificate (Martinez' deposition 35-36). There is no evidence that he asked for maintenance and cure at this or any later time until this action was filed.

### E. Continuation of Maritime Employment Until January, 1961.

After leaving the Silverbow in December, 1957, Plaintiff worked on many other ships until he finally stopped work in January, 1961 (Tr.215, 362-363). A summary of Plaintiff's employment during this period is as follows:

| 1958 | |
|---|---|
| SS Hawaiian Rancher | 4 months |
| SS President Jefferson | 3 months |
| SS P & T Explorer | 3 1/2 months |

1959

| | |
|---|---|
| SS Filmore | 3 months |
| SS Hawaiian Trader | 3 months |

1960

| | |
|---|---|
| SS Matsonia | 2 1/2 months |
| SS Coast Progress | 3 1/2 - 4 months |
| Ship chartered by Matson | 4 months |
| SS Monterey | 1 month (December) |

1961

| | |
|---|---|
| SS Monterey | 1 month (January) |

(Tr.267-277, R.122-124)

There is no evidence that Plaintiff's above maritime employment was other than voluntary.

Plaintiff testified that at various times during this period he had the following symptoms which he believed to be related to the accident: Headaches, a spot of pain in the neck, a sore back, nervousness, confusion of mind and spells characterized by dizziness, blurring of vision, numbness and weakness in the arms and legs and a feeling in the mind as though something were slipping from it (Tr.267-281).

Three or four weeks after leaving the Silverbow he registered at the Union Hall in Honolulu and shipped out again on the Hawaiian Rancher (Tr.267-268).

On March 14, 1958, while aboard the Hawaiian Rancher, Plaintiff lacerated the tip of his right thumb. He had emergency out-patient care and on March 17, 1958 commenced a series of five out-patient visits to San Pedro Public Health Service Clinic which continued until April 11, 1958. The San Pedro Health Service records of those visits contain no reference to any of the symptoms which Plaintiff testified that he was having during this period (Ex.D-4b - D-4h). Plaintiff's own testimony establishes that he did not complain of these symptoms on this occasion (Tr.369-370).

Plaintiff testified that in 1960 when he was working aboard the Coast Progress he did complain about the numbness in his arms and legs; so the purser gave him a Master's certificate to go to the U.S. Public Health Service Clinic in San Pedro (Tr.274). He went to the clinic and was seen by Dr. Jordan. This was the first time since July 24, 1957 that he had seen a doctor for the conditions that he thought resulted from the accident. This was just about two weeks before his deposition in this case and approximately three years from the date of the accident (Tr.369-370, Martinez' deposition 29-30). Up to this time the only medical

treatment that the Plaintiff had obtained for these conditions were aspirin-type and anacin-type pills that he had gotten from the pursers aboard ship and from drug stores, which he testified were generally ineffective.

The San Pedro U.S. Public Health Service Clinic records of this visit state:

> "6-27-60 Complains of vague pains and 'dead sensations' in right ankle, right knee, right wrist, fingers and toe. These sensations come and go, in between episodes he is symptom free. Describes no redness or swelling. Exam of areas mentioned is not remarkable. Patient wants x-rays of knee and ankle. X-rays right knee and ankle--negative.
>
> Impression, possible arthralgia anxiety. DNP(?) sodium salycilate.
>
> Fit for duty.
>
> Signed: Jordan"
>
> (Exs. D-4b - D-4h)

During this visit, Dr. Jordan advised Plaintiff to see a specialist. He was supposed to go on the following day (Tr. 371-372, Ex. D-7). Plaintiff, however, did not see a specialist at that time (Tr. 371-372). Dr. Jordan gave Plaintiff some red capsules for his legs and told him that when the pain and numbness came he should take the pills and sit down. Plaintiff argued with Dr. Jordan that if he sat down, he would be fired. He testified that he left the Coast Progress because he

did not want to be fired from the ship when he had a dizzy spell and had to sit down. He flew home (Tr. 371-372).

On October 22, 1960, Plaintiff was examined by Dr. Rowlin Lichter in Honolulu (Tr.142). Dr. Lichter found Plaintiff to be well built, muscular, jovial and more or less outgoing (Tr.145, 172). In giving his history to Dr. Lichter, Plaintiff stated that since two weeks after the original injury in 1957 he had had headaches which were relieved by aspirin-type and anacin-type drugs off and on which were generally getting a little bit better over the years but had been more or less static for several months (Tr.143-144). He also stated that he had episodes of numbness on the little finger side of his forearm, low backache occasionally radiating into the right leg, with some numbness just above the knee and in the lower half of the left shin bone in front (Tr.144-145). It does not appear that he mentioned to Dr. Lichter his claimed blurring of vision, dizziness, mental sensations and confusion of mind.

Plaintiff testified that while he was aboard the Monterey in December, 1960 and January, 1961, his symptoms recurred and that he was confused and could

not think clearly, so he left the ship and flew home in January, 1961 (Tr.277-279). It does not appear that Plaintiff obtained a Master's certificate when he left the Monterey.

### F. Claimed Period of Disability.

Plaintiff testified that when he got home, his wife took him to a Dr. Rosenberg, to the neighbors and also to some kind of temple. He testified that as time passed he was nervous and couldn't go any place. His wife took him to San Diego County Hospital (Tr.279).

In 1962, Plaintiff was involved in an incident in the local welfare office. A man there claimed that Plaintiff hit him over the head with a telephone. As a result he was convicted of assault and sentenced to 30 days (Tr.379-380).

Plaintiff testified that shortly thereafter in 1962 he was taken to the psychiatric ward of San Diego County Hospital and subsequently declared mentally ill by Judge Glenn apparently on the testimony of his doctors and his wife. Thereafter he was sent to Patton State Hospital where he was treated for about three months (Tr.282-283, Exs.P-5 and P-6). In San Diego County

Hospital and Patton State Hospital, there were two different diagnoses of Plaintiff's problem, depressive psychosis and paranoid schizophrenic psychosis (Tr.232-233, Exs.P-5 and P-6). Prior to being released from Patton State Hospital, Plaintiff admitted to a doctor there that some of the petition (blackouts, etc.) was falsified to insure his getting in the hospital (Tr.122, Exs.P-5). At trial Plaintiff denied having said this (Tr.373). One of Plaintiff's witnesses, Dr. Low, testified that it was his opinion that the petition was in fact true and that Plaintiff's statement that it was falsified was itself a falsification made because Plaintiff wanted to get out of the hospital (Tr.124-215). At trial Plaintiff testified, however, that he did not know what blackouts were, unless that was the doctors' name for his spells of numbness in the arms and legs, etc. (Tr.368-369).

After three months in Patton State Hospital, Plaintiff was released on out-patient family care and given certain medication (Tr.283). He was still on the same medication at the time of trial (Tr.286-287). Plaintiff testified that at the time of trial, his principal present symptom was sleeplessness (Tr.300-301).

G. Medical Testimony.

The Court stated in its findings that the condition which disabled Plaintiff was "a form, at least, of mental illness, whatever it may be called", and subsequently referred to it as "at least a mental illness, whether it be called a post-concussion syndrome or organic psychosis, or by some other name" (R.208). The principle witnesses concerning Plaintiff's conditions possibly included in the above finding were Dr. Low, a psychiatrist, and Dr. Hunter, an uncertified specialist in neuropsychiatry, for Plaintiff and Dr. Cloward, a neurosurgeon and neurologist, for Permanente. None of these doctors appear to have been treating physicians.

1. Dr. Low (Plaintiff's witness). Dr. Low took Plaintiff's history from Plaintiff himself and from the records of Patton State Mental Hospital (Tr.41). He admitted, however, that Plaintiff gave only a list of his symptoms, not a chronology (Tr.113). Dr. Low also admitted that the hospital records indicated that Plaintiff's wife gave the information to the hospital historian (Tr.113). An objection was made to any opinion testimony by Dr. Low, a non-treating physician (Tr.32-33), that was not given in response to a hypothetical question, but the objection was overruled (Tr.35). Dr. Low went on to testify that based

on his assumption from the medical records and from Plaintiff's assertions at the examination, that prior to the injury he had been a very hard worker, outgoing, cheerful, and able to support his family adequately, it was his diagnosis that Plaintiff had suffered a post-traumatic personality disorder (Tr.44). Dr. Low explained that the blow hindered Plaintiff's ability to cope with all the stresses that are present in today's world and made him fearful, which resulted in psychosomatic symptoms (Tr.44-45, 47). Dr. Low testified that the injury triggered a mental condition which may have been latent or dormant; and but for the injury might not have appeared as yet (Tr.48). Dr. Low had had another doctor give Plaintiff a battery of psychological tests to help confirm his medical opinion (Tr.53), but the other doctor did not testify and the records of the test results were neither offered nor admitted in evidence.

At the close of direct examination, Dr. Low was asked a long hypothetical question which included the following language:

> ". . . that his injuries from the fall resulted in cerebral concussion, head and brain injuries, lacerations of scalp; back injury, nerve root involvement, and probably compression fracture of C-6 and -7 cervical region; nervousness; psychiatric disability and mental disorder.

* * *

> "I'm going to ask you, Doctor, to also assume the following facts: That he had been examined by doctors whose reports, findings, and opinions you have read, to wit: Dr. Rowlin Lichter, Dr. Maurice Silver, Dr. William Rhorer, Dr. Ralph B. Cloward, the U.S. Public Health Service Out-Patient Record, X-ray by Dr. George W. Henry, San Diego County General Hospital records, and Patton State Hospital Records . . . I am going to ask you, Doctor, do you have an opinion, based on a reasonable degree of medical certainty, as to whether or not there is a causal connection or relationship between the accident sustained by Juan A. G. Martinez on July 23, 1957, as I have described, and the medical findings--that is, whether the injuries as stated were the competent producing cause of his mental disorder? First of all, Doctor, do you have an opinion?" (Tr.76-78).

The question was objected to on the grounds that the assumptions included facts that had not yet been proven and that the assumptions included the very conclusions for which the questions asked (Tr.74). The question was allowed subject to a motion to strike (Tr.75). After satisfying himself that the assumptions included Plaintiff's prior good health, Dr. Low testified that the accident was a competent cause of Plaintiff's present condition (Tr.78-79). Dr. Low subsequently testified that in the course of his examination of Plaintiff he had perused all the medical records made available to him, and that his opinion testimony was based on the substance of those records, to a degree

(Tr.97-98). Among the letters and reports to which he referred were a letter from a Dr. Rhorer dated August 9, 1960, letters from a Dr. Silber dated July 3, July 7 and October 7, 1963 and a letter to Plaintiff from his social worker from Patton State Hospital written in Spanish (Tr.101-103). Dr. Rhorer's report and one of Dr. Silver's reports were admitted in evidence not to prove the truth of the matter set forth therein, but, only for the purpose of including in the record the document to which the doctor referred (Tr.103-107, Exs.D-12 - D-13).

Dr. Low testified that he gave particular weight to the Patton State Hospital records (Tr.118-119). He also testified that Plaintiff told him that he had had blackouts and that blackouts would be significant because they are abnormal and a feature of a psychotic personality, an escape mechanism, an anger or rage reaction in this case (Tr.114-115, 119). He admitted that if the blackouts had not occurred, his opinion would be changed to a degree (Tr.119).

2. Dr. Hunter (Plaintiff's witness). Dr. Hunter examined Plaintiff during the course of the trial (Tr.223). He took a history from Plaintiff, performed a neurological examination and conducted a psychiatric evaluation on him (Tr.225-228). It was his diagnosis that Plaintiff was showing the classical symptoms of a post-concussion syndrome (Tr.228). He also testified, however, that the symptoms of post-concussion syndrome are all subjective (Tr.243-244). Dr. Hunter testified that he had received and read all of the medical reports written in the case and the records of San Diego County General Hospital and Patton State Mental Hospital. Dr. Hunter was asked the following hypothetical question:

> "Q Doctor, do you have an opinion, based upon a reasonable degree of medical certainty, taking into consideration your findings in your examination and the medicals that you read, the reports, hospital records, as to whether or not there is a causal relationship between the episode which you have described on July 23, 1957, and the resulting conditions today? Is there a causal connection?" (Tr.235).

The Court had previously stated with regard to the testimony of Dr. Hunter:

> "THE COURT: Very well. In line with the discussion in chambers informally, and over the objection of Counsel for the Defendant, which I can well under-

> stand, but in view of Dr. Hunter's having to go back to the Mainland, the Court will again make a special ruling, subject to the same cautions and limitations I have stated heretofore with respect to the other two witnesses, and allowing this witness, the Plaintiff, to be withdrawn, and this witness to be substituted out of order, subject, of course, to the conditions I have stated before of any substantiating -- of substantiating all assumptions of fact upon which any expert opinions are allegedly based; and Counsel undertaking to prove by competent and substantial evidence all of the bases upon which the alleged opinions rest, all of the substantial facts and allegations upon which they rest.
>
> "Very well. All objections heretofore made with respect to the other witnesses are preserved, are to continue and preserve the position to strike in the manner as the other witnesses' testimony, the other expert witnesses." (Tr.219).

Thereafter Dr. Hunter testified that there was a causal relationship between the original injury and the present post-concussion syndrome (Tr.235).

Dr. Hunter testified that his opinion, previously formed, had been strengthened by many of the doctors' reports he read. He testified that the opinion given in Court was based on all of the things he had observed (Tr.239-240).

3. Dr. Lichter (Plaintiff's witness). Dr. Lichter, the orthopedic surgeon who had examined Plaintiff in October, 1960, and subsequently, testified largely concerning certain cervical vertebra and nerve root problems (Tr.147-162) which were not incorporated into the Court's findings. He testified briefly concerning concussion and post-concussion syndrome (Tr.160-162). A hypothetical question which was substantially identical to the one asked of Dr. Low was put to Dr. Lichter concerning the causal relationship between the accident and Plaintiff's physical injuries (Tr. 167-169). The hypothetical was objected to on the same grounds as the objection to Dr. Low's hypothetical and in particular on the ground that it assumed its own conclusion (Tr.169-170). It was admitted subject to a motion to strike (Tr.170). Dr. Lichter testified that the concussion, brain injury, other physical injuries and some degree of nervousness could be ascribed to the 1957 injury (Tr.170). Dr. Lichter also testified that he was not treating Plaintiff (Tr.174-175).

### 4. San Diego County General Hospital and Patton State Hospital Records.

The San Diego County General Hospital (Ex.P-6) and Patton State Hospital records (Ex.P-5) were offered in evidence by Plaintiff (Tr.508, 514). They were ob-

jected to by Permanente on the grounds that there had not been a proper showing of causal connection between the facts set forth in those records and the accident involved in the case (Tr.519-522). The objection was overruled and the records were allowed in evidence subject to a motion to strike (Tr.522).

5. Dr. Cloward (Permanente's witness). Dr. Cloward first examined Plaintiff on July 1, 1963, when requested to perform a neurological examination to determine evidence of brain injury from a reported head injury (Tr.532-533). He had reviewed all of the x-rays during the course of the trial. On the basis of his examination and his review of the x-rays and a lengthy hypothetical question, he expressed the following opinions: The x-rays did not suggest the cervical vertebra and nerve root problems concerning which Dr. Lichter testified. Plaintiff did not have a concussion or post-concussion syndrome because the headaches and dizziness did not appear until two weeks after the injury. Plaintiff had no organic psychosis at the time that Dr. Cloward saw him (Tr.535-536, 540-549, 554-556).

6. Motions. At the close of the Plaintiff's case, Permanente moved for a directed verdict with regard to the conditions to which Plaintiff's doctors testified on

the grounds that they had not been shown by competent evidence to have resulted from the accident and moved to strike the testimony of the three doctors (Tr.524-525). At the close of the entire case, Permanente's motions for directed verdict were renewed, and Permanente moved again that the testimony of Dr. Low, Dr. Lichter and Dr. Hunter be striken on the grounds that the hypothetical questions were faulty and that causation was not established with regard to the symptoms concerning which the doctors testified. The motions were denied (Tr.525). Permanente also moved that the hospital exhibits from Patton State Hospital and San Diego County General Hospital be denied admission in evidence, or if they had been admitted, that they be striken on the ground that causation had not been established since the hypotheticals had not been properly framed (Tr.748-749, 751). The Court denied the motions saying:

> "I'm frank to say, Mr. Sampliner, that I am gravely concerned about the form of the hypothetical questions; but I allowed them in at the time, and I think the best thing to do is to proceed to the jury, and then re-examine them, and I am sure they will be given occasion to do by proper motions.
>
> "So I will deny all motions at this time." (Tr.749-750, 751-752).

## SPECIFICATIONS OF ERROR

1. Denial of motion for summary judgment on issue of maintenance and cure.
2. Denial of motions for directed verdict on issue of maintenance and cure at end of Plaintiff's case and at close of evidence.
3. Denial of motions at end of Plaintiff's case and at close of evidence to strike testimony of Dr. Low, Dr. Lichter and Dr. Hunter.
4. Overruling of Permanente's objections to and denial of Permanente's motion to amend Plaintiff's proposed findings of fact and conclusions of law.
5. Entry of findings of fact that were clearly erroneous.
6. Entry of erroneous conclusions of law.
7. Entry of the supplementary judgment awarding Plaintiff $8,534.00 as and for maintenance and cure.

## SUMMARY OF ARGUMENT

Permanente's obligation to provide maintenance and cure to Plaintiff was terminated as a matter of law by Plaintiff's voluntary continuation of maritime employment on numerous vessels subsequent to the accident and by Plaintiff's refusal, failure, and delay in seeking available medical attention for the conditions which he claims resulted from the accident (Specifications of Error 1, 2, 4, 6 and 7).

The Trial Court's finding of fact that the accident caused Plaintiff's illness was erroneous because all medical testimony concerning the causal relation between the accident and the illness was incompetent, because (1) the hypothetical questions concerning causation put to all three doctors improperly requested that they assume the very conclusions for which they were being asked and because (2) the doctors' opinion testimonies were improperly based on assumed material facts not then and thereafter proved, other experts' opinions and Plaintiff's statements of his history and past subjective complaints on examinations made for the purpose of qualifying non-treating doctors to testify (Specifications of Error 2-7).

The Trial Court's finding of fact that the accident caused Plaintiff to suffer a mental illness was clearly erroneous because against the manifest weight of the evidence (Specifications of Error 4-7).

## ARGUMENT

### I. PERMANENTE'S OBLIGATION TO PROVIDE MAINTENANCE AND CURE WAS TERMINATED BY PLAINTIFF'S VOLUNTARY CONTINUATION OF MARITIME EMPLOYMENT ON NUMEROUS VESSELS SUBSEQUENT TO THE ACCIDENT.

Uncontradicted evidence that Plaintiff voluntarily worked aboard the Silverbow and many other ships from the date of the accident until January, 1961, has been before the Court throughout this case: In the form of Plaintiff's answers to interrogatories (R.122-124) prior to the beginning of the trial and in the form of Plaintiff's own testimony (Tr.212, 215, 266-279, 362-363) and his wage records showing his service aboard the Silverbow (Ex.P-11) thereafter. Indeed the Court's findings of fact entered along with the conclusions of law state:

> "4. That the plaintiff continued to work aboard the SS Permanente Silverbow and on other vessels owned by employers other than the present defendant for various periods until January, 1961." (R.222)

There was no evidence that Plaintiff's continuation of maritime employment was not voluntary.

The Court's supplementary judgment awarded Plaintiff $8,534.00 for maintenance and cure for periods beginning after Plaintiff left his last maritime employment (approximately 3 1/2 years after the accident) until the date of trial. Permanente contends that all of the rulings described in Specifications of Error 1, 2, 4, 6 and 7 were erroneous be-

cause its obligation to provide maintenance and cure in this case was terminated by Plaintiff's continuation of maritime employment on numerous vessels after the accident and that, therefore, Permanente is entitled to a reversal of the supplementary judgment herein and an award of judgment on appeal.

No case was found in which this honorable Court has ruled upon this issue, but the Court of Appeals for the Sixth Circuit held in Inter Ocean S.S. Co. v. Behrendsen, 128 F.2d 506 (6th Cir. 1942), that a seaman could no longer claim maintenance and cure for an intestinal ailment due to contaminated drinking water furnished by the shipowner, where, after having been discharged from the hospital, he resumed his work as seaman on the same and other vessels, even though he claimed that after this time he made substantial expenditures for medical care without which he could not have performed the duties incident to his subsequent employment. The Court of Appeals stated:

> "The duty that develops upon the owner embraces medical care, nursing, and attention in order to effect a cure so far as that may be possible, Whitney v. Olsen, 9 Cir., 108 F. 292, 293, 297, and the obligation does not end with the voyage. It is clear, however, from the holding in Calmar v. Taylor [303 U.S. 525, 82 L.Ed. 993 (1938)] and from the very nature of the concept of maintenance and cure, that the owner's obligation has been discharged when the seaman has successfully reentered gainful employment.***" (At 508)

The District Court for the Southern District of New York came to a similar conclusion in Wilcox v. United States, 32 F.Supp. 947 (S.D.N.Y. 1940). In that case two members of the ship's crew were assaulted by two other members, but both of the former stood their regular watches and received their regular pay to the end of the voyage, and were given medical assistance at the end of the voyage but neglected to continue treatment at a hospital. It was held that under the circumstances maintenance and cure could not be awarded to either, even though medical evidence indicated one had a tenderness in the groin indicating a potential hernia.

To the same effect is The Ball Brothers, 35 F.2d 261 (W.D.N.Y. 1929), in which the court held that libellant was not entitled to maintenance and cure because he continued work on other vessels after the accident and did not present himself for medical attention. See also Brailas v. United States, 79 F. Supp. 963 (S.D.N.Y. 1948), in which the court dismissed a claim for maintenance and cure where it appeared that the libellant returned to maritime work within six months after the accident.

That a return to maritime employment terminates the shipowner's obligation to provide maintenance and cure

is indicated by the statement of the rule in 1 Norris, Seamen, § 561 (2d Ed. 1962):

> "Continuance of employment whether aboard the vessel upon which the seaman had become ill or injured or employment on other ships or other employment will result in terminating payments of maintenance and cure."

In Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 82 L. ed. 993 (1938), cited by the Court of Appeals for the Sixth Circuit in Behrensen, the Supreme Court recognized that the shipowner's duty to provide maintenance and cure to a seaman falling sick or becoming injured in the service of the ship may extend for a fair time after the voyage. It held, however, that the shipowner is not bound to an indefinitely continuing obligation to furnish medical care to a seaman afflicted with an incurable disease. In explaining its holding the Supreme Court reviewed the nature of maintenance and cure, (upon which the Court of Appeals also relied in the Behrensen decision,) finding it to be a duty which arises from the contract of employment and does not rest upon negligence or culpability upon the part of the Master and is not restricted to those cases where the seaman's employment is the cause of the injury or illness. It can be seen from this that maintenance and cure is not a legal mechanism for shifting loss based

either on the theory that the party at fault should pay or on the theory that a profit-making enterprise causing a loss should pay. This was noted by the Supreme Court which expressly stated in the Calmar decision that maintenance and cure is not an award of compensation for disability suffered. Instead it is an implied obligation arising from the seaman's contract of employment with the shipowner.

The nature of the owner's obligation for maintenance and cure as recently stated by the U. S. Supreme Court is as follows:

> "Maintenance and cure is designed to provide a seaman with food and lodging when he becomes sick or injured in the ship's service; and it extends during the period when he is incapacitated to do a seaman's work and continues until he reaches maximum medical recovery." (Emphasis added.) Vaughan v. Atkinson, 369 U.S. 527, 531, 8 L. ed. 2d 88, 92 (1962).

The duration and extent of the owner's obligation is best determined by examining the purposes thereof. In this regard the Supreme Court in the Calmar decision summarizes those purposes as follows:

> "The reasons underlying the rule, to which reference must be made in defining it, are those enumerated in the classic passage by Mr. Justice Story in Harden v. Gordon, Fed.

> Cas. No. 6047 (C.C.): the protection of seamen, who, as a class, are poor, friendless and improvident, from the hazards of illness and abandonment while ill in foreign ports; the inducement to masters and owners to protect the safety and health of seamen while in service; the maintenance of a merchant marine for the commercial service and maritime defense of the nation by inducing men to accept employment in an arduous and perilous service." (303 U.S. 528)

That the obligation for maintenance and cure should terminate completely with the voluntary resumption of maritime employment is borne out by measuring that rule against the classic reasons for maintenance and cure as indicated by Mr. Justice Story. First, does the rule provide adequate protection for seamen from the hazards of illness and abandonment while ill in foreign ports (or domestic)? It does. Having voluntarily resumed subsequent maritime employment, the seaman comes under the umbrella of the maintenance and cure obligation of his subsequent employer. This protection extends even to recurrences of prior illnesses, injuries or conditions. It was recognized in the case of <u>Nielson</u> v. <u>The Laura</u>, Fed. Cas. No. 10092 (D.C. Calif. 1872), that a seaman's sickness need not originate during the voyage to entitle him to maintenance and cure. The only prerequisite in this regard was that it occur--

or recur--during the voyage, without misconduct on his part. And this protection would continue if needed until still another maritime employment had been undertaken by the seaman.

Does the rule provide inducement to masters and owners to protect the safety and health of seamen while in service? This can best be answered by saying that it does not detract from the existing inducement to masters and owners in that regard. And conversely extending the obligation of maintenance and cure of the prior employer will not add to the pre-existing inducements to that employer and his master to take greater steps to protect the health and safety of their seamen. Neither the prior employer nor his master have any way of knowing in advance whether a particular unsafe or unhealthy condition on the vessel will disable a seaman in such a way that, notwithstanding the injury, he will be able to work again in maritime employment. The prior employer and his master do not know what the future of the prospectively disabled seaman is going to be. They must, therefore, protect his health.

Finally, does the rule serve the purpose of building up the merchant marine by inducing men to accept

employment in it? It does, in the same manner that it provides protection for seamen, that is by maintaining a continuous umbrella of maintenance and cure over them from one maritime employment to another.

The most recent policy pronouncement of significance by the U. S. Supreme Court dealing with maintenance and cure is Vaughn v. Atkinson, 369 U.S. 527, 8 L.Ed.2d 888 (1962). That case held that a seaman's recovery for maintenance and cure is not reducible by the amount of his earnings from non-maritime employment during the period before he reaches maximum medical recovery. It may be contended that Vaughn v. Atkinson and the Third Circuit case of Loverich v. Warner, 118 F.2d 690 (3d.Cir. 1941), are authority for the proposition that a seaman's right to maintenance and cure is not finally terminated by subsequent maritime employment on the same and other ships. These cases are distinguishable. Apparently neither case involved a voluntary resumption of maritime employment. The seaman in Vaughn v. Atkinson drove a taxi. It is not clear just what the seaman in Loverich v. Warner did in his subsequent employment with the Reading Co., but it certainly was not maritime. This distinction between subsequent maritime

and non-maritime employment is impliedly recognized in the Loverich opinion:

> "If he [the injured seaman] was already suffering from cancer in one of is developing stages he could hardly look to subsequent employers for the performance of this obligation." 118 F.2d 690 at 691 (3d Cir. 1941).

The subsequent employers referred to by the Court were obviously non-maritime employers who would have no obligation in any event for maintenance and cure.

Once a seaman voluntarily returns to full maritime employment, he is presumably no longer "incapacitated to do a seaman's work," and therefore, under the rule of the U. S. Supreme Court in the Vaughn v. Atkinson decision, itself, the shipowners' maintenance and cure obligation should terminate at that point. Furthermore, upon his return to full maritime employment, the seaman comes under the umbrella of the maintenance and cure of his new employer; he of course does not receive this broad protection where his new employer is non-maritime.

Strong policy considerations favor a rule which finally terminates a shipowner's obligation to provide maintenance and cure when the seaman voluntarily returns to full maritime employment.

First, such a rule clarifies and simplifies the relationship, rights and obligations between the seaman and his past and future employers - a sea of doubt under today's law. Labenz v. National Shipping & Trading Co., 153 F.Supp. 785 (D. Pa. 1957), perhaps exemplifies the present state of confusion. In that case the seaman's subsequent maritime employer, as a condition to the payment of maintenance and cure, required the seaman to assign his right to recovery of maintenance and cure from a prior maritime employer. In order to gain maintenance and cure from the prior employer, who took the position that the seaman was thereby attempting to recover double maintenance and cure, the seaman was forced to a lawsuit. The rule proposed would prevent the subsequent maritime employer, the one to whom the seaman may most conveniently look for maintenance and cure, from forcing the seaman to go against the prior employer for maintenance and cure, as the Plaintiff has done in this case, and from imposing conditions to payment as in Labenz.

Second, policies such as those embodied in statutes of limitations and rule of laches support the rule that voluntary resumption of full maritime employ-

ment terminates the seaman's right to maintenance and cure from a prior employer. As Justice Story himself noted, the merchant marine is "an arduous and perilous service." Its paths may lead to all the ports of the world. Once the injured seaman has returned to full maritime employment with a subsequent employer, as sometimes happens, he may experience a recurrence of his prior injury or disease as a result of incidents or conditions aboard the subsequent employer's ship. If under such circumstances the prior employer's obligation for maintenance and cure is not terminated by the seaman's resumption of full maritime employment, and the maintenance and cure is collected from him on the grounds that the recurrence was partially caused by the injury aboard the prior employer's ship, he is entitled to at least a partial indemnification from the subsequent employer for the contributing causation of the incidents and conditions aboard the latter's ship. See _Jones_ v. _Waterman S.S. Corp._, 155 F.2d 992 (3d Cir. 1946); Gilmore and Black, _Admiralty_ 273-77 (1957). And yet the prior employer may be faced with virtually impossible problems of proof in his attempt to show how the incidents and conditions of the subsequent employ-

ment caused the recurrence. Such difficulties of proof would relate to both the staleness of the evidence relating to the initial injury and the difficulty in locating the proof relating to the subsequent employment, perhaps in some remote area of the world.

An illustration of this problem is found in this case. Plaintiff in his action filed August 5, 1959, alleged that Permanente had "failed, neglected and refused to supply the Plaintiff with the expenses of his maintenance and cure, to his damage in the sum of $10,000." (R.7). This claim was without foundation - Plaintiff was in maritime employment until January, 1961, and no right of maintenance and cure could have accured until that time as was recognized by the Plaintiff's statement of his theory concerning maintenance and cure in the pre-trial order (Tr.142-143). If Plaintiff's attorneys had not included the erroneous maintenance and cure allegation in the action, Plaintiff would have been forced in January, 1961, to amend his action to add a cause of action for maintenance and cure. Such an amendment would have been made 3 1/2 years after the alleged accident upon which the maintenance and cure claim was based, and might well have been barred by laches.

Even if not, Plaintiff had worked on nine ships since the accident, and the difficulty is apparent of attempting to prove the incidents and conditions of the Plaintiff's employments on those ships which might have contributed to the ultimate period of disability.

Permanente concedes that any realistic maintenance and cure must meet the primary objective of making whole the injured or diseased seaman; yet contends that the ship owner's obligation should be stretched no further than required to meet this objective. See the dissent in Vaughn v. Atkinson, 369 U.S. 527 at 536, 8 L.Ed.2d 88 at 95 (1962). A rule terminating the ship owner's maintenance and cure obligation upon the voluntary return of the seaman to another maritime employment meets that test.

The disability and the resultant need for maintenance and cure from a past employer probably no longer exists when a once injured seaman voluntarily returns to full maritime employment. This Court may judicially notice the increasing use by maritime employers of pre-employment physical exams. Permanente started using such exams in 1960 or so (Tr.350). Such exams tend to screen out the seaman who is not in fact fit for duty and thus to force the maintenance and cure obligation of the prior employer to continue as long as the

seaman really is unfit. Should the seaman's return to employment really be premature, however, and should he suffer a recurrence of the old injury or disease, he is within the maintenance and cure umbrella of the subsequent maritime employer. Neilson v. The Laura, supra.

Another consideration influencing the Supreme Court's decision in Vaughn v. Atkinson was avoidance of inducement to the employer to withhold maintenance and cure as a means of forcing sick seamen to go back to work when they should be resting. The rule suggested above would have no such effect, because the return to maritime employment would have to be voluntary. Furthermore, neither the seaman nor the prior shipowner can force the prospective subsequent maritime employer to employ the seaman, if his pre-employment physical exam shows him to be unfit. In this case there is no evidence that the Plaintiff ever requested maintenance and cure before he filed his action or that his continuation of maritime employment was not voluntary. And as mentioned above, the rule should have the effect of inducing prompt payment by clarifying and simplifying the obligation of maintenance and cure.

## II. PERMANENTE'S OBLIGATION TO PAY MAINTENANCE AND CURE WAS TERMINATED BY PLAINTIFF'S REFUSAL, FAILURE, AND DELAY IN SEEKING AVAILABLE MEDICAL ATTENTION FOR THE CONDITIONS WHICH HE CLAIMS RESULTED FROM THE ACCIDENT.

At both his deposition and at trial, Plaintiff testified that his symptoms--headaches, dizzy spells, etc.--commenced approximately 15 days after the accident, while he was still a seaman aboard the Silverbow (Martinez' deposition 29, 53, Tr.209-210, 211, 265-266, 365). At the time that they occurred he certainly must have been well aware of those symptoms because otherwise he would not have been able to testify about them. In addition, he also testified that when he had episodes of dizziness and numbness in the arms and legs, etc. he would lie down for 30 to 45 minutes (Tr.209-210, 277). Furthermore, for relief of those symptoms he obtained aspirin and other pills from the purser aboard the Silverbow and aboard many other ships and from drug stores in his ports of call (Martinez' deposition 26, 29-30, Tr.213-215, 265-273). He was obviously also aware of the availability of treatment at U.S. Public Health Service Clinics because he had the laceration on his head treated at the U.S. Public Health Service Clinic in Honolulu initially (Martinez' deposition 22-23, Tr.206-209, 264, 361-362) and because

he went for treatment of his lacerated thumb to the U.S. Public Health Service Clinic in San Pedro, California, in March and April, 1958 (Exs.D-4b to D-4h). In this regard the following is stated in 1 Norris, Seaman § 594, 685 (2d.Ed. 1962):

> "... The fact that United States Public Health Service Hospitals throughout the country are open to seamen for medical treatment is so well known among them that it should preclude the argument that seafarers may be ignorant of their right to free hospitalization and medical care."

In spite of the foregoing, after July 24, 1957, the Plaintiff did not see any doctor for the conditions that he now thinks resulted from the accident for three years until he went to Dr. Jordan at the U.S. Public Health Service Clinic in San Pedro in June, 1960, two weeks before his scheduled deposition (Martinez' deposition 29-30, Tr.369-370). Prior to this visit, the only "treatment" obtained by Plaintiff for these conditions was aspirin from pursers and drug stores. And even then, when he finally did see a doctor after three years, although he took the pills the doctor gave him, he apparently refused to follow the doctor's advice to go see a specialist for his condition (Martinez' deposition 27, 42, Tr.371-372, Ex.D-7). Instead he flew home.

Plaintiff finally did see a specialist in October, 1960, when he was examined by Dr. Lichter in Honolulu (Tr.142). This examination was apparently made to prepare Dr. Lichter to testify on Plaintiff's behalf at trial. There is no indication in the record, whatsoever, that Dr. Lichter ever treated the Plaintiff. Dr. Lichter admitted at trial that he was not then treating Plaintiff (Tr.174-175).

Even during 1961, following his visit to Dr. Lichter, when Plaintiff was not working, Plaintiff obtained no effective medical treatment. Although Plaintiff testified that his wife took him to a Dr. Rosenburg, to the neighbors and to some kind of temple, there is no indication of any treatment being rendered on these visits except for the Plaintiff's following testimony concerning the nature of his treatment at the temple:

> "We used to go to--she used to take me to some kind of temple, and they used to put some kind of--let's see--invisible shot, they say, to--God was going to do a miracle, or something like that." (Tr.279).

Finally in 1962 Plaintiff obtained significant treatment for the conditions believed related to the accident when he was taken to San Diego County General Hospital and sent to Patton State Hospital. And yet even these

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hospitalizations were not entirely voluntary (Tr.372-373).

Thus for 4 1/2 years or more after the accident that allegedly caused Plaintiff's disabling condition, Plaintiff did virtually nothing about his readily apparent symptoms that he testified were bothering him throughout the entire period. He did virtually nothing even though he well knew that free medical care was readily available to him.

Permanente contends that Plaintiff's refusal, failure and delay in seeking available medical care for symptoms thought to be a result of the accident extinguished as a matter of law its obligation to provide maintenance and cure. The Trial Court, therefore, erred in not granting its motion for summary judgment at the beginning of the trial, in not granting its motions for directed verdict during and at the end of the trial, in entering an erroneous conclusion of law that Plaintiff was entitled to maintenance and cure and in awarding supplementary judgment to the Plaintiff. The supplementary judgment should be reversed, and Permanente should be awarded judgment on appeal.

The law is clear with regard to the consequences of a seaman's refusal, failure, or delay to seek available

medical care for conditions upon which he is basing a claim for maintenance and cure. In *Kossick* v. *United Fruit Co.*, 365 U.S. 731, 737, 6 L.Ed.2d 565 (1961), a recent case involving the seaman's right to insist on private medical care rather than care at a United States Public Health Service facility, the United States Supreme Court stated the rule as follows:

> "Court of Appeals and respondent are certainly correct in considering that a shipowner's duty to provide maintenance and cure may ordinarily be discharged by the issuing of a master's certificate carrying admittance to a public hospital, and that *a seaman who refuses* such a certificate or the *free treatment* to which it entitles him *without just cause, cannot further hold the shipowner to his duty to provide maintenance and cure.* Williams v United States (DC Va) 133 F Supp 319; Luth v Palmer Shipping Co. (CA3 Pa) 210 F2d 224; The Bouker No.2 (CA2 NY) 241 F 831; see Calmar S.S. Corp. v Taylor, 303 US 525, 82 L ed 993, 58 S Ct 651." (Emphasis added.)

This honorable Court also stated the applicable rule in *United States* v. *Johnson*, 160 F.2d 789 (9th Cir. 1947), *aff'd. in pertinent part* 333 U.S. 46, 92 L.Ed. 468 (1948) as follows:

> "It appears to be well settled that a seaman's right to maintenance and cure is forfeited by voluntary rejection of hospital

care.[13]

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"13 Bailey v. City of New York, 2 Cir., 153 F.2d 427; Meyer v. United States 2 Cir., 112F.2d 482; See, Calmar SS Corporation v. Taylor, 303 U.S. 525, 531, 58 S.Ct. 651, 82 L.Ed.993; and Van Camp Sea Food Co. v. Nordyke, 9 Cir., 140 F.2d 902; certiorari denied 322 U.S. 760, 64 S.Ct. 1278, 88 L.Ed. 1587."

The seaman's explanation of his refusal of hospitalization in the Johnson case was that he had already been seen by half a dozen or more doctors who had given their opinions, and he saw no use in going back to another hospital which would simply provide one more doctor's opinions against those already given. If the refusal to obtain a specialist's opinion under those circumstances terminates the shipowner's obligation for maintenance and cure, a fortiori that obligation is terminated by the seaman's refusal to see a specialist at all.

The rule of United States v. Johnson has been recognized in several other circuits. The Court of Appeals for the Second Circuit summarily disposed of a libellant's maintenance and cure claim in Marshall v. Interational Merchantile Marine Co., 39 F.2d 551, 553 (2d Cir. 1930), with the following brief comment:

> "We do not, however, find it necessary to consider this count from the standpoint

> of laches, for the appellant's affidavit contains an admission fatal to her success in a suit for maintenance and cure. It asserts that she was offered hospital treatment and declined it. See The Bouker No. 2 (C.C.A.) 241 F. 831, 835; The Santa Barbara (C.C.A.) 263 F. 369, 371; Stewart v. United States (D.C.) 25 F.2d 869, 870."

See also Zackey v. American Export Lines, 152 F.Supp. 772 (S.D. N.Y. 1957), which cites United States v. Johnson.

The Courts of Appeal's decisions upholding the rule of United States v. Johnson are not restricted to cases involving an express rejection of proper medical care or an express refusal to seek out that care. In the recent case Wiseman v. Sinclair Refining Co., 290 F.2d 818, 820 (2d. Cir. 1961) the Court of Appeals for the Second Circuit noted as one of several grounds for reversing the trial court's award of maintenance and cure:

> "Plaintiff's own testimony demonstrates his failure on several occasions in the course of his cure to seek medical attention and thus to keep the cost of his maintenance and cure to a minimum. Wilson v. United States, 2 Cir., 229 F.2d 277, 281; Repsholdt v. United States, 7 Cir., 205 F.2d 852, 856-857, certiorari denied 346 U.S. 928, 74 S.Ct. 308, 98 L.Ed.420; Bowers v. Seas Shipping Co., 4 Cir., 185 F.2d 352-354; The Saguache, 2 Cir., 112 F.2d 482."

In Repsholdt v. United States, 205 F.2d 852 (7th Cir.), cert. den. 346 U.S. 901, 78 L.Ed. 401 (1953),

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an experienced seaman who, although marine hospitals were available, treated his own minor injury for 44 days, except for one trip to the United States Health Service Clinic where he was given some pills to take, until he saw his own doctor for treatment. The Seventh Circuit held that it was an error to allow him maintenance and cure on the ground that he failed to act with reasonable diligence and failed to go to a hospital to find out what really was the matter with him and to secure proper treatment.

In the *Repsholdt* case, the Seventh Circuit relied on *Bowers* v. *Seas Shipping Co.*, 185 F.2d 352 (4th Cir. 1950). In that case a seaman who injured his knee aboard ship failed to go to available marine hospitals, even though the knee subsequently gave way twice, when he left the ship until his ankle was broken in a fall 50 days or more after the original knee injury. The Fourth Circuit held that he was not entitled to maintenance and cure because of his failure to act with reasonable diligence and his failure to go to a hospital to find out what was really the matter with him. See also *Stone* v. *Marine Transport Lines, Inc.*, 182 F.Supp. 200 (D. Md. 1960) in which a seaman allegedly suffering from eye

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trouble, traumatic epilepsy, anxiety state and post concussion syndrome who intentionally failed to keep a doctor's appointment was disqualified for subsequent maintenance and cure.

The policy behind the rule that the seaman's refusal, failure or delay in obtaining medical care terminates the shipowner's obligation to provide maintenance and cure is clearly one of minimizing the cost of maintenance and cure. Wiseman v. Sinclair Refining Co., 290 F.2d 818, 820 (2d Cir. 1961); See also Gypsum Carrier, Inc. v. Handelsman, 307 F.2d 525, 539 (9th Cir. 1962). It is also fully consistent with the reasons for maintenance and cure as noted above, particularly in that it is in the seaman's own best interest and the best interest of the merchant marine for him to seek prompt and competent medical care. Certainly a contrary rule which would keep able or potentially able workers idle could not be deemed a desirable one. See Vaughn v. Atkinson, 369 U.S. 536-537, 8 L.Ed.2d 88, 92 (1962).

Plaintiff's refusal, failure and delay in seeking medical care in this case were clearly more aggravated than in the cases discussed and should be held to have terminated Permanente's obligation to provide maintenance and cure.

## III. THE TRIAL COURT'S FINDING OF FACT THAT THE ACCIDENT CAUSED PLAINTIFF'S ILLNESS WAS ERRONEOUS BECAUSE ALL MEDICAL TESTIMONY CONCERNING THE CAUSAL RELATION BETWEEN THE ACCIDENT AND THE ILLNESS WAS INCOMPETENT.

Plaintiff allges that he is entitled to maintenance and cure due to a disability caused by injuries from an accident on July 24, 1957, while employed by Permanente as a seaman aboard the Silverbow (R.5-7). His employment by Permanente aboard the Silverbow continued until December 12, 1957 (Tr.212, 266-267, 362-363, 517, Ex.P-11). The claimed period of disability for which the Trial Court awarded maintenance and cure commenced four years later in January, 1961(Tr.142). Permanente has no obligation to the Plaintiff for any illness occurring after his departure from the Silverbow unless that illness was proximately caused by an injury or incident which occurred while the Plaintiff was employed aboard the Silverbow. Bowers v. Seas Shipping Co., 185 F.2d 352 (4th Cir. 1950); The W. H. Hoodless, 38 F.Supp. 432 (E.D. Penn. 1941); Langeland v. United States, 93 F.Supp. 645 (S.D. N.Y. 1950); Luzuriaga v. Moore-McCormack Lines, 1955 A.M.C. 334 (Md., City Ct. 1955); see also 1 Norris, Seaman §§ 557, 566 (2d Ed. 1962).

With regard to the nature of the illness from

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which the Plaintiff's claimed period of disability resulted, the Trial Court's findings were stated in its decision as follows:

> "[H]e [Plaintiff] is in fact suffering from a form, at lease, of mental illness, whatever it may be called. . . ." (R.208).

In order for such an illness to be found to have been proximately caused by an accident which occurred while the Plaintiff was still employed by Permanente aboard the Silverbow, that illness must be shown to be directly related to the accident by expert medical testimony. The requirement that the causal relation between the accident and the alleged mental illness be direct rather than remote is stated in Thompson v. Railway Express Agency, 236 S.W.2d 36, 39 (Mo.App. 1961), which arose in the analogous area of workmen's compensation, as follows:

> "A psychoneurosis under some circumstances does present compensable injury but this should not open the way for indiscriminate compensation on that score simply because it follows an accident. The causal connection with the accident must be proven by clear evidence, for such a neurosis may arise from any number of causes. Dr. Moore testified that Thompson's condition might have been aggravated by the discouraging and rather frightening statement made to him by the first physician he called upon. It might have been aggravated by his hospital treatment. That such conditions can and do at times arise from such things as unhappy domestic

> situations, social relations, or financial worry, leaves their cause for the most part in the realm of nebulous speculation. The causal connection with an accident must not be remote."

The necessity for sufficient medical testimony to relate the disabling neurosis to the accident in order to justify a disability award based on that neurosis is set forth in International Paper Co. v. Wilson, 139 S.2d 644 (Miss. 1962) and Mississippi Products, Inc. v. Skipworth, 118 S.2d 345 (Miss. 1960). A similar case involving a recurrence of hip pain rather than mental illness was Anthony v. Lee Coal Co., 77 Atl.2d 657 (Penn. Supr. 1951). The reasons for requiring expert medical testimony in such cases are clearly stated by a leading authority in the field of workmen's compensation as follows:

> "The increasing tendency to accept awards unsupported by medical testimony should not be allowed to obscure the basic necessity of establishing medical causation by expert testimony in all but the simple and routine cases and even in these cases such evidence is highly desirable and is part of any well-prepared presentation." (2 Larson, Workmen's Compensation § 79.54 at 304 (1961)).

The foregoing rulings are, of course, simply a special application of the general rule excluding opinion testimony of lay witnesses with regard to subjects

requiring special study and skill. This rule is stated in Jones On Evidence as follows:

> ". . . Although some of the cases approach the border line, it is not to be inferred that the opinions of ordinary witnesses are competent as to subjects which require special study and skill and which are proper for the testimony of the expert as distinguished from the ordinary witness--for example, diagnosis of and distinction between forms of disease, or the cause and consequences of disease, especially such forms of disease as do not disclose themselves to the untrained eye in the general physical appearance of the sufferer." (2 Jones, Evidence § 405 at 759 (5th Ed. 1958)).

The medical evidence supporting Plaintiff's claim that his disabling illness was caused by the accident was given by three doctors--Dr. Low, Dr. Lichter and Dr. Hunter--who stated their opinions concerning causation in response to hypothetical questions (Tr.76-79, 167-170, 235). Dr. Low also gave such an opinion in direct testimony not in response to a hypothetical (Tr.47). All of this testimony was admitted over Permanente's objections (Tr.35-36, 74-75, 169-170, 219). Permanente moved to strike the doctor's testimony at the end of Plaintiff's case and again at the end of all the evidence, but the motions were denied (Tr.524-525, 748-751). Permanente contends that all of the testimony by Dr. Low, Dr. Lichter and Dr. Hunter concerning causation was incompetent in the following particulars.

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(1) The hypothetical questions to all three doctors improperly requested that they assume the very conclusions for which they were being asked.

The hypothetical questions to Dr. Low concerning causal relation between the accident and Plaintiff's mental illness and to Dr. Lichter concerning causal relation between the accident and Plaintiff's physical injuries were substantially identical. Both included in the requested assumptions the following language:

> "I want you to further assume, Doctor, . . . that his injuries from the fall resulted in cerebral concussion, head and brain injuries, lacerations of scalp, back injury, nerve root involvement and probably compression fracture of C-6 and -7, cervical region; nervousness, psychiatric disability and mental disorder." (Tr.76-77, 167).

The hypothetical question to Dr. Hunter contained the following language:

> "Doctor, do you have an opinion . . . as to whether or not there is a causal relationship between the episode which you have described on July 23, 1957 and the resulting conditions today? Is there a causal connection?" (Tr.235).

Whether these hypotheticals be characterized as truisms or as assuming their own conclusion, or as hoisting themselves by their own boot straps, or as begging the question or conclusion, or as avoiding the issue, or as leading, or as assuming facts not in evidence, their fallacy

is obvious. Having been told to assume that the conditions in question resulted from the fall, the doctors could have no meaningful opinion to offer the trier of fact concerning the existence of a causal relationship between those condition and the fall. Treating the matter strictly as one of facts never introduced into evidence, the assumption that the Plaintiff's injuries from the fall resulted in the series of complications listed was nowhere supported by evidence in the case except the very opinion testimony given in reliance on the assumption. The hypothetical questions were all objected to generally on the grounds that the assumptions included facts not in evidence and particularly on the grounds that they assumed their own conclusions. Their incompetence in these regards is clear from this one aspect alone.

### (2) The three doctors' opinions, given both in response to hypotheticals and directly, were based on assumed material facts not then or thereafter proved and upon other opinions.

Dr. Hunter testified that he had received and read all of the medical reports written in the case and the records of San Diego County General Hospital and Patton State Hospital (Tr.231). The hypothetical question concerning the causal relation between the accident and the Plaintiff's conditions at the time of trial, which Plaintiff's attorney

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put to Dr. Hunter, requested Dr. Hunter to assume the truth of the substance of all of those documents. The wording of the question was as follows:

> "Doctor, do you have an opinion, based upon a reasonable degree of medical certainty, taking into consideration your findings in your examination and the medicals that you read, the reports, hospital records, as to whether or not there is a casual relationship between the episode which you have described on July 23, 1957 and the resulting conditions today? Is there a causal connection?" (Tr.235).

Dr. Low and Dr. Lichter were likewise requested to assume the truth of the contents of the doctors' records as follows:

> "I'm going to ask you, Doctor, to also assume the following facts: That he had been examined by doctors whose reports, findings, and opinions you have read, to wit: Dr. Rowlin Lichter, Dr. Maurice Silver, Dr. William L. Rhorer, Dr. Ralph B. Cloward, the U.S. Public Health Service Out-patient record, x-ray by Dr. George W. Henry, San Diego County General Hospital records, and Patton State Hospital records . . . ." (Tr.77-78, 168).

After Dr. Low was asked the hypothetical question, he expressly raised the issue as to whether or not he was to assume the substance of the medical records, and the Court instructed him that he was to do that (Tr.78). Dr. Low had previously testified that he had taken the Plaintiff's history partially from the records of Patton State Mental Hospital (Tr. 41), even though admitting that these records indicated that

Plaintiff's wife gave the information to the hospital historian (Tr.113). On cross-examination Dr. Low also testified that in the course of his examination of Plaintiff he has perused all the medical reports made available to him, which he listed, and that all of his opinion testimony was based on the substance of those reports, to a degree (Tr.97-98). He testified that he gave particular weight to the Patton State Hospital records (Tr.118-119). Dr. Hunter tesitifed that his opinions, although previously formed, had been strengthened by many of the doctors' reports that he had read and that the opinion to which he testified in Court was based on all of the things that he had observed, including the doctor's reports and medical records (Tr.239-240).

The doctors' reports which Dr. Low, Dr. Lichter and Dr. Hunter were asked to assume the truth of the substance of in giving their opinion concerning the causal relationship between the accident and the Plaintiff's allegedly disabling condition were never admitted in evidence <u>for the purpose of proving the truth thereof</u>. Dr. Lichter, Dr. Hunter and Dr. Cloward testified in the case; so to the extent that their testimony was consistent with their reports, it might be considered that the substance of those reports was supported by evidence. Dr. Rhorer and Dr. Silver, authors of two of the

reports assumed valid in the hypothetical question, however, did not testify in the case. Their reports were admitted into evidence expressly for the limited purpose of showing the documents upon which the other doctors had relied in giving their opinion testimony, but not to prove the truth thereof (Tr.103-107, Exs.D-12 and D-13).

Although the hospital records were admitted in evidence as business records, they contain hearsay, particularly the history given by Plaintiff's wife, that was admissible only for the limited purpose of showing the information upon which the doctors at the hospitals based their diagnosis and treatment. 6 Wigmore, Evidence §§ 1718, 1719 (3d Ed. 1940). Several of the events included in the history given by the wife were not supported by the testimony of Plaintiff or any other witness at the trial. Indeed Plaintiff himself clearly contradicted the history of blackouts (Tr.368), a symptom which Dr. Low found to be significant (Tr.114-119). Dr. Low even went so far as to say that Plaintiff's statement, which was recorded in the hospital records, that the history of blackouts was a falsification was itself a falsification prompted by Plaintiff's desire to be released from Patton State Hospital (Tr.122-125).

All of the medical reports and hospital records of course included statements of the opinions of the doctors preparing them (E.g. Ex.D-12, D-13, P-5 and P-6).

Dr. Low, in giving his opinion, also took into consideration a letter in Spanish to Plaintiff from his social worker at Patton State Hospital (Tr.102-103) and an apparently verbal report from a psychologist of the results of certain tests he had made on Plaintiff (Tr.110-112). The letter was neither offered nor admitted in evidence, and the psychologist did not testify in the case.

It is clear a doctor's opinion testimony, particularly that given in response to a hypothetical, must be based upon facts which the interrogating party claims have been proved and for which there is supporting evidence. 2 Jones, Evidence §416 at 782 (5th Ed. 1958).

There is ample legal authority to the effect that a hypothetical question to a medical expert is improper if it is based upon a hospital record or some other doctor's medical report, first because it involves the assumption of facts not otherwise supported in the evidence in violation of the rule just stated, and second because it requests the witness to give an opinion which is based upon the opinion of another. With regard to the first of these two defects, the late Professor McCormick stated the following in his text:

> "The prevailing view, however, is that a question calling for the witness' opinion on the basis of such reports [doctor's report or hospital records] (without reciting their contents as hypotheses, to be supported by other

> evidence as their truth) is improper. The essential objection seems to be that since the question is not hypothetical in form, the jury is asked to accept as evidence the witness' inference, based upon <u>someone else's hearsay assertion of a fact which is, presumably, not supported by any evidence at the trial</u> and which therefore the jury has no basis for finding to be true." McCormick, <u>Evidence</u> 32 (1954). (Emphasis added.)

In the very recent case <u>Wild</u> v. <u>Bass</u>, 173 S.2d 647 (Miss. 1965), a doctor gave an opinion based on what the Plaintiff's mother had told him about the circumstances of the accident and also in reliance on x-rays not in evidence and on reports from other doctors who did not testify in the case. The Court held that it was error for him to give an opinion based on the statements of the Plaintiff's mother and went on to say:

> "As an expert he could consider testimony of other doctors properly in evidence and also the result of any x-rays properly in evidence, but he should not have been allowed to base his testimony on reports of other doctors and x-rays not in evidence. . . . A medical expert should not be allowed to base his opinion on matters not within his own knowledge and not in evidence in the case." (At 651-652).

The reason for these rules are obviously that the trier of fact has no basis upon which to judge the truth of facts not admitted in evidence and, therefore, no basis for judging the reliability of a medical opinion based upon them.

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With regard to the second defect that such a hypothetical question seeks an opinion based upon another opinion, the following is stated in Corpus Juris Secundum:

> "Usually a hypothetical question to a medical expert is improper if it includes an opinion expressed by another expert; and his rule applies where an expert medical witness is called on to answer a hypothetical question which requires him to accept as true a hospital record which has been introduced into evidence and which contains notations in the form of opinions expressed by other physicians relating to the physical condition of the employee while a patient in the hospital." 100 C.J.S., Workmen's Compensation § 537, at 553-54.

This honorable Court established the same rule for the Ninth Circuit in Corrigan v. United States, 82 F.2d 106 (9th Cir. 1936) in which it held to have been properly sustained objections to questions requesting a doctor's opinion based on the diagnoses and other opinions of other doctors. The Court expressed its opinion as follows:

> "We believe the question was objectionable because it would permit the expert to base his opinion on the opinions of other experts. In Laughlin v. Christensen (C.C.A. 8) 1 F. (2d) 215, 219, it is said: 'It is the rule that it is not allowable in asking a hypothetical question to incorporate into it the opinion of another expert. . . ." (At 107).

And see Zelenka v. Industrial Commission, 138 N.E.2d 667, 671-72 (Ohio 1956). In explaining this rule the late

Professor McCormick states:

> "And it might be arguable, that since the expert in giving a private opinion would certainly take into account previously expressed opinions of other experts on the same question, he should be allowed to do so on the stand. But on the stand he is not asked merely to take them into account, but to assume them to be true, and if he does this his own opinion may then be but an academic echo. It is held that such a question, which asks the witness to assume the truth of testimony which itself includes expert opinions is improper." McCormick, Evidence § 14 at 31 (1954).

These two defects pervaded all of the opinion testimony given by Plaintiff's doctors and should be adequate grounds for complete rejection thereof.

(3) Dr. Low's direct opinion testimony, which was not given in response to a hypothetical, was based on history, including past subjective symptoms, given by Plaintiff in order to prepare Dr. Low, a non-treating physician, for testifying at trial.

Dr. Low testifed that his examination of Plaintiff had been for the purpose of preparing for trial and that he did not expect to treat Plaintiff (Tr.32-33). He stated that he had taken Plaintiff's history from Plaintiff himself and from the Patton State Hospital records, as discussed above (Tr.41). That history included recitals of Plaintiff's subjective symptoms (Tr.42-43, 47), and some obviously self-serving assertions by Plaintiff concerning his character and

personality prior to the accident (Tr.44). Thereafter Dr. Low gave his opinion concerning Plaintiff's diagnosis (Tr.44), prognosis (Tr.44) and his evaluation of the overall picture (Tr.44-45, 47), including an explanation of the effect that the blow Plaintiff received in this accident had upon him (Tr.47). These all refer exclusively to Plaintiff's subjective symptoms and, therefore, are obviously based on the history Dr. Low received from Plaintiff, since no hypothetical question had been put to the doctor up to that time.

Prior to the commencement by the doctor of his relation the history he had received and his opinions, Permanente objected to his giving opinion testimony other than in response to hypothetical questions, since he was not a treating physician (Tr.35). The Trial Court overruled the objection (Tr.35) and clearly erred in so doing.

The federal evidence rule is clear in such circumstances that the opinion of a doctor based on statements, including a recount of subjective symptoms, related to the doctor by the patient on an examination is inadmissible where the examination was made for the purpose of qualifying the doctor to testify as a medical expert. _Atlantic Coast Line R. Co._ v. _Dixon_, 207 F.2d 899, 903

(5th Cir. 1953); Nashville, C. & St.L. Ry. Co. v. York, 127 F.2d 606 (6th Cir. 1942); Grand Trunk Pac. Ry. Co. v. Tollard, 286 F.676 (8th Cir. 1923); and see Cummings v. Boston & M.R.R., 212 F.2d 133, 135 (1st Cir. 1954) and Cf. Meaney v. United States, 112 F.2d 538, 540 (2d Cir. 1940).

On the several foregoing grounds Permanente contends that the Trial Court erred in denying Permanente's motions to strike the testimony by Dr. Low, Dr. Lichter and Dr. Hunter, particularly insofar as that testimony related to any causal relationship between the accident and Plaintiff's allegedly disabling illness. This error was prejudicial because it related to all of the expert medical testimony tending to show that such a causal relationship existed, and the establishment of the causal relationship by expert medical testimony is a prerequisite to Plaintiff's recovery of maintenance and cure herein. Permanente contends, therefore, that on these grounds the supplemental judgment should be reversed and a new trial granted.

## IV. THE TRIAL COURT'S FINDING OF FACT THAT THE ACCIDENT CAUSED PLAINTIFF TO SUFFER A MENTAL ILLNESS WAS CLEARLY ERRONEOUS BECAUSE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

As previously indicated, the Court's finding that the accident caused Plaintiff to suffer "a form, at least, of illness" is regarded to be based on expert medical opinion testimony that the illness in fact existed and was directly related to the accident (pp.55 -57 supra). Permanente has heretofore contended that the medical opinion testimony relied on by the Trial Court was incompetent. Permanente further contends that that medical opinion testimony was manifestly outweighed by other evidence, medical and non-medical, which indicated that the accident was not the proximate cause of any mental illness in Plaintiff.

Nonetheless, analyzing the testimony of Dr. Low, we find that his diagnosis was post-traumatice mental disorder (Tr.44), almost as vague a diagnosis as the Trial Court's finding. The real basis of Dr. Low's opinion is Plaintiff's assertion that prior to the accident he was a hard worker, outgoing, and could support his family adequately (Tr.44) and the assumption that prior to the accident Plaintiff had none of the symptoms claimed to any incapacitating degree (Tr.78-79), whereas after the accident he did have such symptoms. Dr. Lichter testified, however, that when Plaintiff visited

him in October, 1960, he was "jovial, outgoing more or less" (Tr.145). And there is no evidence in the record that Plaintiff even had a family to support prior to the accident. He was married in December, 1958, one-and-a-half years afterwards (Tr.379, 384-385). Most significant of all, however, is that neither the hypothetical question put to Dr. Low concerning the causal relation between the accident and Plaintiff's post-traumatic personality disorder (Tr.76-77) nor the Plaintiff's history, when given to Dr. Low, included any chronology of the symptoms Plaintiff claimed to have experienced (Tr.113). In other words, Dr. Low reasoned that before the accident Plaintiff was a model of adjustment without any symptoms, and at some unknown times during the six-and-a-half years between the accident and the trial he had symptoms, and therefore, the symptoms were the result of the accident, _q_. _e_. _d_. The fallaciousness of such _post_ _hoc_, _propter_ _hoc_ reasoning is too obvious to belabor. Suffice it to recall that there are listed in the opinion in _Thompson_ v. _Railway Express Agency_, 236 S.W.2d 36, 39 (Mo.App.1961) some of the various possible causes of psychoneurosis, which is one type of possible post-traumatic personality disorder.

Dr. Low's evaluation of the overall case is no more logical. He emphasized that prior to the accident Plaintiff was in the protected enviroment of the merchant marine where he knew

just what to do (Tr.45) and that supposedly the accident suddenly made him less able "to cope with the stresses that are present in today's world" and thus raised fear within him (Tr.45, 47). But Plaintiff remained within his "protected environment". He stayed in the merchant marine and did his usual work for three-and-a-half years after the accident (Tr.267-277, 362, R. 122-124), and there is no testimony whatsoever that any sequelae of the accident in any way interfered with Plaintiff's ability to do his job during that time. There is no evidence that Plaintiff had "to cope with all the stresses that are present in today's world", at least until he was married in December, 1958.

Reviewing Dr. Hunter's testimony in order to determine the weight to be given it, we note that his diagnosis of Plaintiff's problem was that Plaintiff showed the classic symptoms of post-concussion syndrome. It appears that he, too, was given merely a list of symptoms (Tr.226-227), not a chronology of when they occured. He compared that list with the appropriate list for post concussion syndrome, (a syndrome being merely a "symptom complex") (Tr.231). The evidence showed, however, that Plaintiff did not begin to have headaches, dizzy spells and blurring of vision for 12 to 15 days after the accident (Tr.209-210, 211, 265-266). The numb feeling in his legs and arms started one

or two months after the accident (Tr.365-366). And the ringing in his ears did not start until three-and-a-half years later when he was aboard the Monterey in December, 1960 and January, 1961 (Tr.278). Dr. Cloward's testimony, which was unrebutted in this regard, was that if Plaintiff had suffered a post-concussion syndrome his headaches and dizzy spells would have come on immediately thereafter. He testified that since Plaintiff did not have these symptoms immediately after the accident, he had not had a concussion in the accident (Tr.545-546). He also testified that he doubted very much if the accident could have caused Plaintiff to suffer any organic psychosis (Tr.547). This testimony, too, was unrebutted.

Another most significant aspect that must be noted with regard to the weight to be given to the opinion testimony of both Dr. Low and Dr. Hunter is that the mental illness that they believed that Plaintiff had suffered as a result of the accident were both characterized solely by subjective symptoms (Tr.41-47, 116-117, 230-231, 243-244)--not observed by the doctor but merely communicated by the patient (Tr.116-117). In giving medical opinions based on such testimony a doctor necessarily relies on the veracity of the patient or person relating them to him (Tr.244). In this case very substantial doubt was cast upon Plaintiff's veracity at nearly every step. He told

four different stories concerning the way in which the accident happened and his testimony conflicted with that of both Captain O'Brien and the union delegate Awakuni, a disinterested witness, in several material particulars (see pp.6-10, 13-14 supra). It was apparent that the Court did not rely on Plaintiff's testimony at least concerning where the accident occured, preferring to look to Permanente's admission in an answer to interrogatory (No.8, R.30) which was not even offered or admitted in evidence in the case (Tr.H-19, R.206-208). And the psychiatrist Dr. Low, Plaintiff's own witness, testified that it was his opinion that Plaintiff lied at the Patton State Hospital when prompted by his desire to leave that institution (Tr.122-125).

Even more significant, both with regard to the doubt case upon Plaintiff's veracity and with regard to direct factual rebuttal of the Trial Court's finding that the accident proximately caused Plaintiff to suffer a mental illness, are Plaintiff's work history and his medical history, or lack thereof, during the three-and-a-half years from the date of the accident until January, 1961. Plaintiff worked full voyages of approximately three months duration each on eight or nine ships during that time (see pp.14-15 supra). It is not reasonable to expect he would have been able to do that if he had been suffering the symptoms he claims in sufficient intensity to result

in mental illness. Whether or not he could have worked, furthermore we do not believe that he would have, if he had been suffering the symptoms he claims. As an experienced seaman, he was well aware of his right to take time off to recuperate and to draw maintenance and cure while doing so. He did that during March and April, 1958, after he had cut his thumb (Ex.D-4b - D-4h, Martinez' deposition 39, 41). In spite of this there is no evidence whatsoever that Plaintiff, himself, requested either time off or maintenance and cure for the symptoms claimed from any employer at all during the entire time.

As indicated above, Plaintiff was well aware of the availability of free medical teeatment at United States Public Health Service facilities for any symptoms he might have had (pp.46-47, supra). Nonetheless he saw no doctor for his symptoms until three years after the accident when he saw Dr. Jordan at the United States Public Health Service Clinic in San Pedro, in June, 1960. And even then he did not follow Dr. Jordan's instruction to go see a specialist. Plaintiff's egregious refusal, failure and delay in seeking medical treatment for his symptoms, (pp.46-49, supra) belies the very existence of those symptoms. What is more, when Plaintiff did go to the United States Public Health Service Clinic in San Pedro after he had cut his thumb and to Dr. Jordan and Dr. Lichter with regard to

his symptoms, he did not even mention several of the supposedly continuous symptoms which were related by Dr. Low and Dr. Hunter to his mental illness--blurring of vision, dizziness, mental sensations and confusion of mind (Ex.D-4b - D-4h, Tr.142-145). The best explanation for Plaintiff's failure to even mention his claimed symptoms to the doctors was that he simply did not have them.

Another aspect of Plaintiff's medical history that significantly rebuts the Trial Court's finding of causation is that Plaintiff was declared fit for duty by United States Public Health Service Clinics no less than three times between the date of the accident and January, 1961, on July 24, 1957 in Honolulu (Ex.D-4a), on April 11, 1958 in San Pedro and again on June 27, 1960 in San Pedro (Ex.D-4b - D-4h). The first and the last of these visits on which Plaintiff was found fit for duty were directly related to the symptoms Plaintiff was supposedly suffering as a result of the accident. The significance of such clinical findings that a seaman is fit for duty has been discussed at length in decisions relating to maintenance and cure. Norris states:

> "Where a seaman has been discharged from a Marine Hospital as 'fit for duty,' the courts may, and generally do, use the date of such discharge when determining the end of the period for which the seaman is entitled to maintenance and cure." 1 Norris, <u>Seamen</u> § 561, at 634 (2d Ed. 1962).

It is conceded that the issuance of a fit-for-duty slip is not conclusive. The appropriate weight to be given to the fact, however, is well described in Carleno v. Marine Transport Lines, Inc., 317 F.2d 662, 665 (4th Cir. 1963) as follows:

> "Of course, the certification of his capability as of that date is not conclusive. But it is a consideration of quite some import. Especially when within a few months and for the next two years he ships in the rugged service of an ordinary sailor as well as in the less rigorous life of a bo'sun." (Emphasis added.)

See also Dobbs v. Lykes Bros. Steamship Co., 243 F.2d 55 (5th Cir. 1957).

It must be noted that the Trial Court's decision fails even to mention the United States Public Health Service Clinics' findings that Plaintiff was fit for duty.

Permanente contends that in veiw of all of the foregoing factors, the manifest weight of the evidence shows that Plaintiff did not suffer mental illness as a proximate result of the accident involved in this case. To be compared with the Trial Court's decision in this case are W. H. Hoodless, 38 F.S. 432 (E.D. Pa. 1941); Langeland v. United States 93 F.Supp. 645 (S.D. N.Y. 1950) and Luzuriaga v. Moore-McCormack Lines, 1955 A.M.C. 334 (Md. City Ct. 1955). In those three cases the

evidence was less extreme and weighed less heavily against the Plaintiff than it does in this case, and yet in each the Trial Court ruled that it had not been shown that the disability involved was caused by the accident aboard the Defendant's ship.

On this ground, Permanente contends that it is entitled to reversal of the supplemental judgment and to judgment on appeal.

DATED: Honolulu, Hawaii, January 31, 1966.

Respectfully submitted,

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# CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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